



IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,

v.

U.S. PHILIPS CORPORATION, NORTH
AMERICAN PHILIPS CORPORATION, AND
N.V. PHILIPS GLOEILAMPENFABRIEKEN
and
WINDMERE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY OF PETITIONER TO THE JOINT
BRIEF OF RESPONDENTS IN OPPOSITION

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February 8, 1993

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**REPLY OF PETITIONER TO THE JOINT
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1. Although Respondents argue that there is no conflict among the circuits warranting review, they acknowledge that the practice of the courts of appeals on whether a district court judgment should be vacated at the request of parties settling the case on appeal ranges from (1) routinely *declining* to vacate the district court judgment (the Seventh, Third, and District of Columbia Circuits) to (2) balancing the private interest in vacatur against the public interest in preserving the judgment (the Ninth Circuit) to (3) routinely vacating the trial court judgment (the Federal Circuit, as evidenced here, and the Second Circuit). (*See* Joint Brief of Respondents in Opposition ("Opp.") at 9 n. 5.) As Respondents ultimately concede, "the courts of appeals clearly differ on whether the interests of the parties in vacating a judgment generally should prevail over the

public interest in preserving precedents" (Opp. at 9.) This admission confirms that there is a conflict among the circuits on the issue of vacatur in connection with settlement.

2. Respondents rely on various orders of this Court summarily vacating lower court judgments, including *City Gas Co. of Florida v. Consolidated Gas Co. of Florida*, 111 S. Ct. 1300 (1991), as supporting their opposition to review (Opp. at 5-6). These orders, however, do not contain any legal discussion of the issue of vacatur in connection with settlement and cannot be properly read as establishing any precedent on the issue. Moreover, there is considerable disagreement with the Federal Circuit's (A5) and Respondents' (Opp. at 6-7) position that this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), supports routinely granting vacatur in connection with settlement. See, e.g., *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991) (*Munsingwear* was concerned with vacating a judgment where review is prevented by "happenstance," and choosing to settle rather than pursue an appeal is not "happenstance"); *Matter of Memorial Hospital*, 862 F.2d 1299, 1301 (7th Cir. 1988) (under *Munsingwear*, the judgment should be vacated only when parties are *unable* to obtain appellate review). See also *Karcher v. May*, 484 U.S. 72, 83 (1987). Accordingly, review of this issue and guidance by the Court is needed.

3. Contrary to Respondents' arguments (Opp. at 4-5), Petitioner Izumi has standing. Izumi timely sought to intervene in the Federal Circuit as soon as Windmere, Izumi's indemnitee, joined in the motion to vacate. Moreover, while Respondents concede that Izumi "could seek review ... by petitioning for certiorari on the standing issue" (Opp. at 4-5), they are wrong in saying that Izumi has not done that here. In its petition, Izumi stated that the Federal Circuit erred in refusing to allow it to intervene in the appeal to oppose vacatur and, thus, that "Izumi is entitled under 28 U.S.C. § 1254(1) to seek review of the

Federal Circuit's holding that Izumi lacked standing to challenge the motion to vacate." (Petition at 15.)

4. Izumi can hardly be characterized as having only an "attenuated connection to the judgments at issue" (Opp. at 2) or as being a "stranger" to the litigation (Opp. at 3). Izumi funded Windmere's defense of Philips' unfair competition claim and would have had to pay any damages awarded to Philips (A14), and the district court judgment, until vacated, prevented Philips from again raising that claim, whether against Izumi or against another Izumi customer. Accordingly, the decision denying Izumi leave to intervene and granting vacatur directly affected Izumi.

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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